Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Ruhrgas AG ("Ruhrgas"), subject to and without waiver of its challenge to the personal jurisdiction of the courts of Texas, submits this Reply to the Brief in Opposition of Marathon Oil Co., Marathon International Oil Co., and Marathon Petroleum Norge ("Marathon Plaintiffs").

REPLY TO RESPONDENTS' JURISDICTIONAL STATEMENT

Review by this Court of the Fifth Circuit's decision in this case is not barred by 28 U.S.C. § 1447(d). The wording of § 1447 and this Court's recent decision in *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), make it clear that only district court remand orders are unreviewable on appeal. In *Caterpillar*, this Court held that *"district court orders* remanding cases to state courts generally are 'not reviewable on appeal or otherwise,' § 1447(d). Congress did not similarly exclude appellate review of refusals to remand." *Id.* at 476-77 (emphasis added).

Procedurally, *Caterpillar* is indistinguishable from this case. In both, the case was removed from state court to federal court, the plaintiff moved to remand, the district court denied the motion to remand, and the court of appeals vacated the judgment for lack of subject matter jurisdiction. *Id.* at 470-71.[1] Notwithstanding § 1447(d),

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[1] The Marathon Plaintiffs wrongly assert Ruhrgas improperly delayed the case. In fact, Ruhrgas legitimately asserted its rights to have disputes arising under the Heimdal Gas Sales Agreement resolved in arbitration in Sweden, not in the Texas state courts. Any delay is due to the Marathon group

this Court granted certiorari in *Caterpillar*. Just as this Court had the power to grant certiorari in *Caterpillar*, this Court has the power to grant Ruhrgas' Petition.[2]

REPLY ON THE MERITS OF THE PETITION

Most of the Brief in Opposition is devoted to what the Marathon Plaintiffs refer to as "the question of whether arbitration can be compelled on the basis of a corporate affiliation." Brief in Opp. at 5. That is *not* the question presented by Ruhrgas' Petition. The question is whether under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("the New York Convention"), an American group of companies can *circumvent* an international arbitration clause by using affiliates to assert claims arising out of the agreement.

The Marathon Plaintiffs do not deny that the Marathon group of companies hand-picked the plaintiffs and the forum to circumvent the arbitration clause of the Heimdal Gas Sales Agreement ("HGSA"). The Marathon Plaintiffs simply argue that they are not parties to the HGSA, and under federal law, as corporate entities separate from Marathon Petroleum Company (Norway)

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of companies' efforts to circumvent the HGSA arbitral obligation, not Ruhrgas' actions.

[2] *Things Remembered, Inc. v. Petrarca*, 116 S.Ct. 494 (1995), cited by the Marathon Plaintiffs, is not to the contrary. *Petrarca* involved a district court remand order. This Court, in describing the reach of § 1447(d), stated that "Congress has placed broad restrictions on the power of federal appellate courts to review *district court* orders *remanding* removed cases to state court." *Id.* at 496 (emphasis added).

("MPN"), they can *never* be compelled to arbitrate under the New York Convention. In short, the Marathon Plaintiffs argue that federal law allows the Marathon group of companies to evade the arbitration clause in the HGSA by employing the corporate equivalent of a shell game.

As shown below, this argument, adopted by the Fifth Circuit, is contrary to other courts of appeals' decisions. Further, a denial of certiorari will send the message to the international community that the American courts will allow American groups of companies to engage in forum shopping in disputes involving international transactions, notwithstanding the existence of an arbitration clause in the underlying agreement. That message will "imperil the willingness and ability of businessmen to enter into international commercial agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974), and cast doubt on the United States' commitment to its treaty obligations. The Petition presents an important question of federal law which should be settled by this Court.

I. The New York Convention Does Not Require That the Marathon Plaintiffs Be Parties to the HGSA.

The Marathon Plaintiffs' argument that Ruhrgas has admitted that it had "no agreements with any of the Plaintiffs" begs the question presented by the Petition. Ruhrgas' consistent position has been that it contracted *only* with MPN and had no agreement with the Marathon Plaintiffs. The question is whether this fact grants the Marathon group of companies a license to circumvent the arbitration clause in the HGSA by using affiliates of MPN to assert claims arising under the HGSA. If so, the New

York Convention's guarantee of a neutral forum for resolving international disputes is eliminated.

The New York Convention does not require that the parties to the dispute be formal parties to the written contract containing the arbitration clause. As noted in *Thomson-CSF, S.A. v. American Arbitration Ass'n.*, 64 F.3d 773, 777 (2d Cir. 1995), there are "a number of theories under which nonsignatories may be bound to the arbitration agreements of others." For example, in both *J. J. Ryan & Sons, Inc. v. Rhone-Poulenc Textile, S.A.*, 863 F.2d 315, 320 (4th Cir. 1988) and *Deloitte Noraudit A/S v. Deloitte, Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993), the parties to a dispute arising from an international transaction were not parties to an agreement containing an arbitration clause, but the courts nevertheless compelled arbitration based on estoppel principles. Those decisions cannot be reconciled with the standard adopted by the Fifth Circuit, which held that an arbitration agreement "between the parties to this litigation" is a "necessary predicate" to arbitrability. 115 F.3d at 321. The Fifth Circuit's holding conflicts with other courts of appeals' decisions and raises a serious question under the New York Convention on which the lower courts need guidance.

II. The Absence of Express Provisions in the HGSA Addressing the Arbitrability of Claims of "Affiliates" Does Not Support the Marathon Plaintiffs.

The Marathon Plaintiffs urge that if the parties had intended MPN's affiliates to be bound to the arbitration clause in the HGSA, they would have included express

provisions to that effect.[3] Again, the Marathon Plaintiffs' argument ignores the question presented by Ruhrgas' Petition. Ruhrgas is not asking this Court to adopt a rule requiring all affiliates of signatories to arbitrate all claims. Ruhrgas asks this Court to adopt a rule which will not permit groups of companies to circumvent arbitration agreements through the use of non-signatory affiliates as straw plaintiffs to assert claims arising under the agreement. It was unnecessary for the parties to attempt to incorporate express provisions addressing every possible scenario in which an affiliate would be obligated to arbitrate. The parties were entitled to leave that issue to the applicable rules and law governing the agreement. *Compare Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129-30 (1991). The HGSA's silence on that issue cannot be construed as an agreement by Ruhrgas that the Marathon group of companies could use the parent company and wholly-controlled Marathon affiliates to evade arbitration.

III. The Marathon Plaintiffs' Suggestion That Their Claims are Independent of MPN's Claims Is A Subterfuge.

The Marathon Plaintiffs expend little effort to show that their claims are in any way independent of MPN's claims. The Marathon Plaintiffs simply assert, with

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[3] The Marathon Plaintiffs point to the definition of the term "Affiliates" in the HGSA and its use in two HGSA provisions. The fact that the parties provided that consultants or experts appointed under the HGSA could not be affiliated with any of the parties is irrelevant to the question whether a claim asserted by an affiliate is arbitrable.

virtually no explanation, that Plaintiffs Marathon Oil Co. ("MOC") and Marathon International Oil Co. ("MIOC") are alleging fraud claims and that Plaintiff Marathon Petroleum Norge ("Norge") is alleging a tortious interference claim. However, the Marathon Plaintiffs' filings and their witnesses' testimony demonstrate the transparency of the Marathon group of companies' attempt to circumvent the obligation to arbitrate this dispute and the need for this Court to define the federal courts' obligation to enforce the New York Convention.

The Marathon Plaintiffs' claims are predicated on allegations that Ruhrgas promised a "premium price" to Marathon personnel who were acting on behalf of *MPN*,[4] wrongfully underpaid *MPN* (which financially crippled *MPN*),[5] and then tortiously interfered with *MPN*'s efforts to find other prospective purchasers.[6] The only reason for the Marathon group of companies to prevent MPN from initiating arbitration in Sweden to assert these claims, and instead use the Marathon Plaintiffs to assert these claims in a Texas state court,[7] is to circumvent the obligation to arbitrate in Sweden

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[4] The Marathon Plaintiffs' own witnesses admitted in deposition that when Marathon personnel dealt with Ruhrgas, they did so on behalf of MPN.

[5] In a district court brief, the Marathon Plaintiffs described the claims of MOC and MIOC: "Thus, if [MPN] had repaid the note, the funds originally loaned by MOC and MIOC would have been recouped through dividends. . . . On the other hand, if [MPN] could not repay the note, (which is the case due to Ruhrgas' action), then MOC and MIOC bear the full extent of the loss."

[6] First Amended Petition (Brief in Opp. App. A.) ¶¶ 43, 46.

[7] If the Marathon group of companies is allowed to proceed with its subterfuge, Ruhrgas will be exposed to the risk of

and force Ruhrgas to defend its conduct under the HGSA in a distant, inconvenient, unfamiliar, and unanticipated forum.[8] By permitting circumvention of arbitral obligations, the Fifth Circuit severely undermined the reliability of arbitration agreements in international commercial transactions guaranteed by the New York Convention and this Court's decisions in *Scherk v. Alberto-Culver Co.*, 417 U.S. at 516-20, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985) and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995).

IV. By Rejecting Without Discussion the Applicability of International "Group of Companies" Principles, the Fifth Circuit Exalted the Primacy of United States Law and Failed to Respect the Capacity of International Tribunals.

In their Brief in Opposition, the Marathon Plaintiffs assert *for the first time in this case*[9] that the laws of various

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double payments. Under their theory, if the Marathon Plaintiffs were to recover a judgment in this case based on a higher "promised premium price," MPN could then initiate arbitration in Sweden and seek recovery of that same price.

[8] The Marathon Plaintiffs suggest that Texas is not a distant or unfamiliar forum for Ruhrgas based on purported Texas contacts. The Brief in Opposition blatantly mischaracterizes those contacts, which are accurately described in the district court's memorandum and order dismissing the case. Pet. for Cert. App. B-16, 17. The district court held these contacts insufficient to support personal jurisdiction. *Id.* They also provide no basis whatsoever for the assertion that Texas is a forum for dispute resolution which is convenient or familiar to Ruhrgas.

[9] The Marathon Plaintiffs gave no notice to the district court of their intention to rely on foreign law, as required by Fed. R. Civ. P.

European countries (which are not applicable under the HGSA)[10] reject the group of companies principles applied by the Paris Court of Appeals in *Dow Chem. v. Isover Saint Gobain*, Cour d'Appel Paris 21, October 1983, 110 J. 899 (1983) IX Yearbook 132 (1984) (Pet. for Cert. App. I). The Marathon Plaintiffs cite two foreign treatises only for the unremarkable principle that a company *generally* is not bound to arbitrate under an affiliate's contract. However, this is not the question. Rather, it is whether American courts will sanction the circumvention of an arbitration clause enforceable under the New York Convention through the use of the signatory's parent or its wholly-controlled non-signatory affiliates as claimants. The foreign treatises cited by the Marathon Plaintiffs do not support an argument that affiliates can be used as an artifice to evade arbitration. Furthermore, the Marathon Plaintiffs' suggestion that international law rejects *Dow's* group of companies principles is refuted by an authority

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44.1, and made no argument based thereon in the Fifth Circuit. The Marathon Plaintiffs neglected to provide an English translation of the treatises on which they rely or even a copy of them as appendices to their Brief in Opposition, rendering it extremely difficult for Ruhrgas to respond fully consistent with Rule 15's time constraints. It is precisely this type of unfair surprise which Rule 44.1 is designed to avoid. Fed. R. Civ. P. 44.1 advisory committee notes.

[10] Although the Marathon Plaintiffs make assertions concerning German, Belgian, French, Italian, Dutch, and Swiss law, the HGSA is governed by Norwegian law and arbitration matters are governed by the rules of the International Chamber of Commerce ("ICC"), the Procedural Laws of Sweden, and the New York Convention. *See* Pet. for Cert. App. E.

on international arbitration. Klaus Peter Berger, International Economic Arbitration 159-60 (1993) (commenting that *Dow* has "served as the leading precedent in subsequent arbitrations").

The Marathon Plaintiffs' efforts to distinguish *Dow* likewise are unavailing. Both this case and *Dow* involved a claim by a non-signatory against a signatory. The only difference is that in *Dow*, the signatory defendant opposed arbitration, and in this case, the non-signatory claimants are opposing arbitration. This is a distinction without any plausible difference. Under the Marathon Plaintiffs' interpretation of *Dow*, the Marathon Plaintiffs could force Ruhrgas to arbitrate the claims asserted in this case, but Ruhrgas cannot require the Marathon Plaintiffs to arbitrate those same claims. That result makes no sense, and is contrary to the express rationale of the decision in *Dow*, as cited in the Petition. Pet. for Cert. at 17 and App. I-11.

Inasmuch as the negotiation and execution of the HGSA and MPN's performance thereunder was and is conducted by personnel of MOC and MIOC acting on behalf of MPN, the rationale of the *Dow* decision applies equally to this case. The group of companies principles applied in *Dow* are, at a minimum, *arguably* applicable to the facts of this case. Because all doubts should be resolved in favor of arbitration, *Mitsubishi*, 473 U.S. at 626, the Fifth Circuit should have recognized the potential applicability of the group of companies principles and allowed the ICC panel to determine whether those principles apply. *Compare Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Systems Co.*, 643 F.2d 863, 869 (1st Cir. 1985).

Instead, the Fifth Circuit, without discussion, rejected application of those principles. In doing so, the Fifth Circuit "exalt[ed] the primacy of United States law" and refused to "respect . . . the capacities of foreign and transnational tribunals," in violation of this Court's teachings in *Scherk*, 417 U.S. at 517 n.11 and *Mitsubishi*, 473 U.S. at 629, casting doubt on the United States' commitment to its obligations under the New York Convention. The Fifth Circuit's cavalier approach to those fundamental issues, with great importance for the international trade community, demonstrates the need for guidance from this Court in the proper interpretation and application of the New York Convention.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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